IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 4949 OF 1993

Surendra M. Wagh & anr. ... Petitioners

V/s

Manohar Krishna Kale & anr. ... Respondents

Mr. M.W. Padgaonkar for the petitioner.

Mr. N.B. Shah for the respondents.

CORAM: P.V. KAKADE, J.

DATED: 4TH MAY, 2006

ORAL JUDGMENT:

1. The petitioner tenants have preferred this petition against the judgment and order passed by the lower appellate Court dated 25th October, 1993 dismissing the Appeal No. 7 of 1992 and confirming the order passed by the Trial Court dated 5th October, 1991 whereby the petitioners were directed to hand over the vacant and peaceful possession of the suit premises to the present respondents.

2. I have heard the learned counsel for both parties. Perused the record.

3. The original plaintiff had filed the suit for possession of the suit premises i.e. Block No. 2, "Anupam" situated at 777 Tilak Road, Dadar, Bombay - 400 028 against the original tenant Vasant G. Thakur (defendant No.1) and his sister-in-law Mrs. Rajani Talwalkar (sister of 1st defendant's wife) as the 2nd defendant. The plaintiff had claimed possession on two grounds, namely, (i) that the tenant had acquired suitable alternative accommodation and (ii) defendant No.1 had sublet the premises to defendant No.2. The plaintiff's case was based on the fact that the 1st defendant was an Under Secretary to the State Government and was given Government accommodation being Govt. Bungalow No.7, Opp. Sachivalaya and was required to shift to the said bungalow alongwith his family members in June, 1973. On the death of the original 1st defendant in 1990, the present petitioners were brought on record as legal heirs and representatives of original defendant No.1. The original defendant No.1 had stated in his evidence that defendant No.1b i.e, first petitioner was staying with the tenant since 1958 continuously as a member of his family.

On pleading of both parties, the trial proceeded and the

Trial Court, after considering the evidence on record, decreed the suit on the ground that the 1st defendant had acquired suitable residential accommodation. However, the Trial Court held that the plaintiff had failed to prove that the defendant No.1 had unlawfully sublet the premises in favour of the defendant No.2.

The appeal was carried to the lower appellate Court. The lower appellate Court was of the view that the findings recorded by the Trial Court on the ground of residential accommodation was required to be evicted and further it was also held that subletting was proved. In the result the appeal was dismissed and cross-objection filed by the respondent came to be allowed. Hence the present petition.

4. The learned counsel for the petitioner submitted that though there are concurrent findings of both the Courts below on the ground of acquisition of suitable accommodation, there was conflicting finding on the point of subletting. On this back ground, it would be proper to address both points separately.

5. On the question of subletting, it was submitted on behalf of the petitioner that pleadings and evidence on

record show that defendant No.2 who was sister-in-law of defendant No.1 was gratituously allowed to occupy the suit premises when defendant No.1 shifted to Government accommodation. The Trial Court observed that, during the pendency of the suit, defendant No.1 re-occupied the suit premises and defendant No.2 left the same and went to reside at Palghar. The petitioner submit that the said observation showed that defendant No.2 was temporarily allowed to occupy the suit premises to take care of the suit premises and there was no parting with possession of the premises. The original 1st defendant tenant had specifically denied in his evidence that he had sublet the suit premises since he had not recovered any rent or compensation. The Trial Court had further observed that there was no evidence of consideration. Therefore, the Trial Court was of the opinion that no consideration was paid to defendant No.2 by defendant No.1 towards occupation of the suit premises and, therefore, the burden was cast upon the landlord to prove consideration which was not discharged and, therefore, the landlord failed to prove the alleged unlawful subletting and the transfer of his interest. This finding came to be reversed by the appellate Court relying upon the statements in an affidavit filed by the defendant No.1 in an earlier suit filed by the landlord

for injunction being R.A.D. Suit No. 5014 of 1973. Apart from the general statement in the said affidavit contending that 1st defendant was entitled to permit the said premises to be occupied on leave and license, the defendant No.1 had stated in the said affidavit that he had allowed his siter-in-law and her children to use the premises temporarily from 15.8.1973. If we peruse the said statement at verbatim, it is clear that apart from the general statements by way of legal submissions, the said submissions clearly show that 1st defendant had not recovered any compensation from defendant No.2. It appears that the lower appellate Court was of the view that defendant No.1 had to prove that he was not charging anything, which, in my view, is clearly erroneous since burden could not be cast on the first defendant to prove a negative fact.

6. In view of these aspects, it is to be noted that the evidence on record shows absence of ingredient of subletting i.e. defendant (i) transfer of interest/parting with possession, and (ii) payment of consideration. Therefore, it is obvious that there was no subletting as contemplated under Sec.13(1)(e) of the Bombay Rent Act and the appellate Court has committed patent error in reversing the finding of the Trial

Court.

The Apex Court, in the case of **Delhi Stationers & Printers v/s Rajendra Kumar, reported in (1990) 2 SCC 331,** has observed thus -

> "Sub-letting means transfer of an exclusive right to enjoy the property in favour of the third party and the said right must be in lieu of payment of some compensation or rent. Parting of the legal possession means possession with the right to include and also a right to exclude others. Mere occupation is not sufficient to infer either sub-tenancy or parting with possession."

7. In view of these observations, as well as the settled legal position, it is clear that the decree could not have been passed on the ground of subletting of the suit premises and the said finding recorded by the lower appellate Court has to be set aside.

8. Next comes the question whether the original defendant had acquired suitable accommodation. As regard to this aspect, we must take into account the provision

of Sec. 13(1)(l) of the Bombay Rent Act which reads thus :-

> **"Sec.13(1)(l):** ..... that the tenant after the coming into operation of this Act has built, acquired vacant possession of or been allotted to suitable residence."

In the present case, the original tenant, by virtue of his employment as Resident Under Secretary, Government of Maharashtra, was required to shift to Government quarters at Churchgate, Bombay. The admitted position was that the tenant Vasant Thakur's occupation of the Government quarters was limited to the duration of his employment and on his retirement from service in 1984, he re-occupied the suit premises. In such circumstances, the crucial question which was required to be determined by the Courts below was whether shifting to temporary Government accommodation for the duration of the tenant's employment, could amount to acquisition of suitable residence as contemplated by Sec. 13(1)(l) of the Bombay Rent Act.

9. In my considered view, the concept of "acquisition" as contemplated by Sec. 13(1)(l) of the said Act,

necessarily implied "as of right" and that mere temporary residence for the purpose of employment could not possibly be construed as "acquisition" or an "allotment" within the meaning of Sec. 13(1)(l) so as to render the tenant liable for eviction. For the purpose of interpretation of statutory provision, the Court is required to consider the legislative intention and also the consequences of a particular interpretation. If "acquired" or "allotted" were construed to include temporary accommodation for the purpose of employment, such an interpretation would cause grave injustice. For example, if a judicial or medical officer were allotted government quarters for a short term of a couple of years and during that term his landlord filed an eviction suit against him regarding his rental premises, the interpretation applied by the appellate Court would render such a judicial officer or medical officer liable for eviction under the said provisions of the Rent Act which could not possibly have been the intention of the legislature while enacting Sec. 13(1)(l) of the Bombay Rent Act.

10. In this regard, therefore, I am of the considered view that the appellate Court has erroneously concentrated on the suitability of alternative

accommodation without adequately appreciating whether temporary residence in government accommodation amounted to acquisition or allotment within the scope of Sec. 13(1)(l) of the Bombay Rent Act.

11. In this regard, the Apex Court, in the case of Ganpat Ram Sharma & ors. v/s Smt. Gayatri Devi, reported in **AIR 1987 SC 2016,** made certain observations. The said judgment pertains to Sec. 14(1)(h) of the Delhi Rent Control Act, which provision is same to Sec. 13(1)(l) of the Bombay Rent Act. While interpreting the said provision, the Apex Court expressed in para 16 as under:-

> **"Para 16.** The words 'has built' or 'has acquired' or 'has been allotted' clearly mean that the tenant has already built, acquired or been allotted the residence to which he can move and that on the date of the application for his eviction his right to reside therein exists. It was therefore held that the words as they stood associated with each other in clause (h) lead to the only conclusion that as on the date of the application the tenant must be possessing a clear right to reside in some

> other premises than the tenancy premises as a matter of his own rightful choice either because he may have built such premises or acquired vacant possession thereof or the same may have been allotted to him."

12. It appears from the record that the lower appellate Court has also not considered another judgment of the Apex Court in the case of **B.R. Mehta v/s Smt. Atma Devi & ors., reported in AIR 1987 SC 2220,** which deals with allotment of government quarters to the wife of the tenant. In para 4 of the judgment, the Apex Court observed that the correct position must be that if the tenant has a legal right, then only can such acquisition or allotment would attract the provision of Sec. 14(1)(h) of the Delhi Rent Control Act. It is further opined that, if in the real sense the tenant acquired or was allotted another residence, then his need for the old tenanted residence would go and the tenant would lose his right to retain his tenanted premises. If we apply this ratio to the present set of facts, then it is clear that acquisition or allotment as contemplated by Sec. 13(1)(l) of the Bombay Rent Act necessarily implied "as of right" and mere temporary occupation of quarters for the purpose of employment could not amount

to acquisition of suitable accommodation so as to render the tenant liable for eviction from the rental premises. It also appears from the perusal of the judgment of the lower appellate Court that it has merely opined that it did not find any error or illegality in the findings of the Trial Court that defendant No.1 had acquired suitable residential accommodation. Thereafter the lower appellate Court proceeds on the basis of evidence of suitability of accommodation itself and proceeded to hold that the findings recorded by the Trial Court appear to be legal. While doing so, the appellate Court, in my considered view, did not take into account all the relevant aspects noted above.

13. At this juncture, the judgment of the Gujrat High Court in the case of **Francis Dias v/s H. Sumatilal, reported in AIR 1985 Gujrat 171,** Justice Ahmadi (as he was then) has interpreted Sec. 13(1)(l) of the Bombay Rent Act and observed as follows:

> "Read in the contest of the preceding words, acquisition of possession can never mean permission for temporary use of a suitable residence. The word "acquire" is a well understood legal term and when used with the

> term "possession" it generally means something more than mere temporary possession, it usually implies a vesting of interest or some substantial right to possess the residence. Even the words "has been allotted" a suitable residence mean more than mere temporary residence, they mean allotment as of right..... What is sought to be conveyed is that he must have acquired right to possess another suitable residence, a right which he can enforce in a Court of law if he is sought to be dispossessed."

Similar view has been taken by this Court in the case of **Pramila Madhav Damle & ors. v/s Waman R. Koparde, reported in 1999 (1) Mh.L.J. 830**. Relying on the Supreme Court judgment in the case of **B.R. Mehta v/s Atma Devi (Supra),** this Court has opined that in order to bring the case under the mischief of Sec.13(1)(l) of the Bombay Rent Act, the tenant should acquire or must be able to reside in the alternate accommodation as a matter of right, then only Sec. 13(1)(l) would be attracted.

14. In view of this position, I have no doubt

whatsoever that the lower appellate Court has fallen in error while interpreting the scope of Sec. 13(1)(l) of the Bombay Rent Act as well as Sec. 13(1)(e) while dismissing the appeal of the petitioner and, therefore, it must be held that the order of the lower appellate Court cannot sustain in law.

15. Under the circumstances, I have no doubt whatsoever that the petitioner has succeeded in establishing that the view taken by the lower appellate Court reflects a fundamental error of law in failing to appreciate that the temporary allotment of Government quarters for the purpose of duration of employment could amount to allotment within the ambit of Sec. 13(1)(l) of the Bombay Rent Act.

16. In the result, the Rule is made absolute. The petition is allowed in terms of prayer clause (b) and stands disposed of with no order as to costs.

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